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To be argued by
WILLIAM J. JUNKERMAN

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JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs-Appellants,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S [redacted] APPENDIX

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellee

WILLIAM J. JUNKERMAN
DOUGLAS B. BOWRING
Of Counsel

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Order Entered on Motion to Dismiss Original Complaint as Orally Amended

(52)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

RUTH NOEL,

Plaintiff,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Defendant having moved this Court for an order dismissing the complaint upon the ground that the court lacks jurisdiction of the subject matter of the suit as a civil action and upon the further ground that such a suit may only be brought by the personal representative of the decedent in a district court of the United States in admiralty, for the exclusive benefit of the decedent's next of kin and said motion having duly come on to be heard before this Court on July 31, 1956,

Now, on reading defendant's notice of motion, dated July 25, 1956, and the complaint herein in support of defendant's motion, and the affidavit of Morris L. Weisberg, Esq., sworn to the 6th day of August, 1956, in opposition thereto, and after hearing Haight, Gardner, Poor & Havens (William J. Junkerman, Esq., of counsel) in support of said motion, and Messrs. Harry Norman Ball, Joseph G. Feldman, and Lipper, Shinn & Keeley (Morris L. Weisberg, Esq., of counsel) in opposition thereto, and plaintiff, upon the argument of said motion, having amended her complaint with the consent of defendant's

Order Entered on Motion to Dismiss Original Complaint as Orally Amended

counsel, and the court having considered such amendment as a part of plaintiff's opposition (53) to said motion, and due deliberation having been had thereon, and the court having made and filed its decision on August 22, 1956, it is, on motion of Haight, Gardner, Poor & Havens, attorneys for defendant,

ORDERED, that defendant's motion to dismiss the complaint upon the ground that this Court does not have jurisdiction of the subject matter of the suit as a civil action, be and the same hereby is granted without prejudice to plaintiff's right to institute a suit in admiralty against defendant within the time limited by law.

Dated: New York, N. Y., September 19th, 1956.

JOHN W. CASHIN
U. S. D. J.

Sept. 19, 1956

Judgment Entered

HERBERT A. CHARLSON
Clerk

Notice of Entry Endorsed on Initial Order

(54(a))

PLEASE TAKE NOTICE that an Order and Judgment of which the within is a copy, was this day duly entered and filed in the within entitled action in the office of the Clerk of the U. S. District Court for the Southern District of New York, in the U. S. Courthouse at Foley Square, in the Borough of Manhattan in the City of New York.

Dated, New York, Sept. 19, 1956

Yours, &c.,

HAIGHT, GARDNER, POOR & HAVENS,
Attorneys for Defendant,
Office and Post Office Address:
80 Broad Street,
Borough of Manhattan,
New York 4, N. Y.

To

LIPPER, SHINN & KEELEY,
Attorneys for Plaintiff,
527 Fifth Avenue,
New York 17, N. Y.

AFFIDAVIT OF SERVICE BY MAIL, ANNEXED TO INITIAL ORDER WITH NOTICE OF ENTRY

(54)

State of New York,
County of New York—ss.:

GEORGE J. BIERNESSER, being duly sworn deposes and says; that on the 21st day of September 1956, he served the annexed order with Notice of Entry upon Lipper, Shinn & Keeley, 527 Fifth Ave., New York 17, N. Y., the attorney for the plaintiff named therein, by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government, at No. 80 Broad Street, New York 4, N. Y., directed to said attorney at the above address, that being the last address within that State designated by said attorney on the previous papers in this action as the place where said attorney then kept an office for the regular transaction of business, between which places there then was and now is regular communication by mail. Deponent is over the age of 18 years.

GEORGE J. BIERNESSER

Sworn to before me this
21st day of September, 1956.

GEORGE H. HEARN
Notary Public

GEORGE H. HEARN
Notary Public, State of New York
No. 24-6824150
Qualified in Kings County
Cert. filed with New York Co. Clerk
Term expires March 30, 1958

(Seal)

Notice of Motion to Dismiss the Amended Complaint

(23)

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that the defendant will move this Court at a Stated Term thereof for the hearing of motions, to be held on Room 506 of the United States Court House at Foley Square in the Borough of Manhattan, County, City and State of New York, on the 25th day of September, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order,

(1) Dismissing the amended complaint herein bearing the caption:

"IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,
Plaintiffs,

—against—

LINEA AEROPOSTAL VENEZOLANA,
Defendant"

Civil Action No. 110–338
(Jury Trial Demanded)

pursuant to Rule 12 of the Rules of Civil Procedure upon the ground that this Court lacks jurisdiction over the subject matter of such a suit brought as a civil jury action.

(24)

PLEASE TAKE FURTHER NOTICE that upon the annexed affidavit of William J. Junkerman, sworn to the 13th day of

September, 1956, the defendant will further move this Court at the same time and place as specified above for an order

(2) Dismissing said amended complaint upon the ground that it was not served in compliance with Rule 15(a) of the Rules of Civil Procedure;

(3) Dismissing said amended complaint pursuant to Rule 56 of the Rules of Civil Procedure upon the ground that the issues therein contained have already been decided by this Court adversely to the plaintiff in a decision in this action handed down by United States District Judge John M. Cashin, August 22, 1956, and that they are therefore *res adjudicata;* and

(4) Granting to defendant such other and further relief as to the court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are required to be served five (5) days before the return date of this motion.

Dated: New York, N. Y., September 13, 1956.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
80 Broad Street
New York 4, N. Y.

By WILLIAM J. JUNKERMAN
A Member of the firm.

To:

LIPPER, SHINN & KEELEY, ESQS.
Attorneys for Plaintiff
527 — 5th Avenue
New York, N. Y.

Affidavit of William J. Junkerman

(25)

[SAME TITLE]

State of New York,
County of New York—ss.:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendant in the above-entitled action, and as such I am familiar with all the pleadings and proceedings heretofore had herein. I make this affidavit in support of defendant's motion to dismiss the amended complaint herein pursuant to Rules 12 and 56 of the Rules of Civil Procedure and for the further reason that service of said amended complaint was not authorized under Rule 15(a) of the Rules of Civil Procedure.

This action was instituted by the service of a summons and complaint on July 9, 1956. Defendant moved to dismiss said complaint upon the ground that this Court lacks jurisdiction of such a suit brought as a civil jury action and upon the further ground that such a suit may only be brought by the personal representative of the decedent in a District Court of the United States, in admiralty, for (26) the exclusive benefit of decedent's next of kin. Said motion came on to be heard before Honorable John M. Cashin, one of the judges of this Court, at a Stated Term thereof for the hearing of motions on July 31, 1956. Upon the argument of said motion on that date, with the consent of defendant's counsel, plaintiff moved

for and obtained leave to amend her complaint so as to bring it in the name of the personal representative of the decedent and setting forth an additional cause of action based on the terms of the "Convention For The Unification of Certain Rules Relating to International Transportation by Air" (49 Stat. Part 2, p. 3000 et seq.), commonly called the "Warsaw Convention". Subsequently, in a decision handed down on August 22, 1956, Judge Cashin granted defendant's motion dismissing the complaint on the grounds that this Court does not have jurisdiction of the subject matter of the suit as a civil action. In the meantime, Harry Norman Ball, Esq., one of the several attorneys representing the plaintiff herein, served a formal written amended complaint by mail from his office in Philadelphia on August 21, 1956. A copy of said amended complaint was received by defendant's attorneys on August 22, 1956, the date of Judge Cashin's decision.

A copy of said amended complaint so served by mail and a copy of Judge Cashin's decision will be submitted to the court upon the return date of this motion.

It is respectfully submitted that, having amended her pleading once upon the argument of the motion before Judge Cashin, plaintiff had no right to amend her complaint a second time without permission of the court as she attempted to do with the service of said amended complaint on August 21, 1956.

(27)

It is further respectfully submitted that all of the issues raised in the said amended complaint so served on August 21, 1956, were resolved against plaintiff in Judge Cashin's decision and that they are, therefore, *res adjudicata*.

Affidavit of William J. Junkerman

WHEREFORE, for all the reasons stated above defendant respectfully requests an order dismissing the amended complaint served on August 21, 1956.

WILLIAM J. JUNKERMAN

(Sworn to September 13, 1956.)

Affidavit Contra Defendant's Motion to Dismiss the Amended Complaint

(55)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

(Jury trial demanded)

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Commonwealth of Pennsylvania,
County of Philadelphia—ss.:

MORRIS L. WEISBERG, being duly sworn, deposes and says as follows:

I am an attorney at law and am associated with Harry Norman Ball, Esq., 1010 Packard Building, Philadelphia,

Affidavit Contra Defendant's Motion to Dismiss the Amended Complaint

I'a., one of the attorneys for plaintiffs in the above-entitled action, and as such I am familiar with all the pleadings and proceedings heretofore had herein. I make this affidavit contra defendant's motion to dismiss the amended complaint.

Defendant moved to dismiss the complaint filed herein upon the ground that this Court lacks jurisdiction of such suit brought as a civil jury action and upon the (55a) further ground that such suit may only be brought by the personal representative of the decedent in a District Court of the United States, in admiralty for the exclusive benefit of decedent's next of kin. This motion came on to be heard before Honorable John M. Cashin, at a stated Term thereof for the hearing of motions on July 31, 1956.

The complaint filed herein names Ruth Noel as plaintiff, the widow of decedent. Paragraph 4 of the complaint alleges that:

> "The death of [Marshal L. Noel] was caused by the wrongful acts, neglect, default, and *wilful misconduct* of defendant, its servants, agents and employes in the construction, design, maintenance and/or operation of the said aircraft." (Emphasis supplied.)

The allegation of "wilful misconduct" was based upon the Warsaw Convention.

Upon the argument of defendant's motion to dismiss the complaint on July 31, 1956, I pointed out that defendant in filing such motion had deliberately ignored the grounding of the complaint not solely upon the Death on the High Seas Act but, in addition, upon the International Treaty. I requested the Court's permission to amend the complaint so as to allege specifically a cause of action under the Warsaw Convention and, in addition, to change the parties plaintiff from Ruth Noel alone to (56) Ruth

Affidavit Contra Defendant's Motion to Dismiss the Amended Complaint

Noel and Wm. H. Frantz, the executors of the Estate of Marshal L. Noel, Deceased, named on July 27, 1956 in the Bergen County Court (Probate Division) in New Jersey. The Court declined to grant leave to amend at that time. Counsel for defendant, William J. Junkerman, Esq., waived objection to the defect in party plaintiff but took the position that no possible amendment could cure the alleged jurisdictional defect, including an amendment asserting a cause of action under the Warsaw Convention.

Upon the said argument, Honorable John M. Cashin inquired whether I desired to file a brief or affidavit and I informed the Court that I did. Counsel for defendant requested leave to file a reply brief since the contention based upon the Warsaw Convention was in his view a new contention.

On August 6, 1956, I sent to Honorable John M. Cashin and to counsel for defendant copies of "Memorandum and Affidavit Contra Defendant's Motion to Dismiss the Complaint". In the affidavit referred to I stated that:

> "Plaintiff intends to file forthwith an amended complaint as, of course, under Federal Rule 15(a). Such amended complaint will specifically refer to the Warsaw Convention and not merely utilize the phrase 'wilful misconduct'.
>
> "The amended complaint will allege that (57) it is brought under the Federal Death on the High Seas Act (46 U. S. C. § 761) and in the alternative, that it is brought under the Warsaw Convention (49 Stat. 3000).
>
> • • • •
>
> "Ruth M. Noel and Wm. H. Frantz, Executors of the Estate of Marshal L. Noel, Deceased, will be the parties plaintiff in the amended complaint, and both the statutory and treaty causes of action will be asserted by them."

Affidavit Contra Defendant's Motion to Dismiss the Amended Compiaint

At page 27 of the "Memorandum and Affidavit Contra Defendant's Motion to Dismiss the Complaint" which I filed with the Honorable John M. Cashin I argued the proposition: "Plaintiff has an absolute right to amend the complaint", stating that: "If any doubt existed, therefore, that the instant complaint is bottomed not only on the federal statute, but, in addition, upon the treaty of the United States (Warsaw Convention) plaintiff would have an absolute right to amend to allege a cause of action under the treaty, which cause of action is not confined to the admiralty forum".

On August 21, 1956 I sent to Douglas B. Bowring, Esq., of counsel for defendant (Certified Mail No. 770250) a copy of the amended complaint herein with a letter stating that the amended complaint was "being filed with the Clerk".

(58)

On August 20, 1956 I sent 2 copies of the amended complaint to Aaron Lipper, Esq., with instructions to file the amended complaint with the Clerk and to leave a copy at Hon. John M. Cashin's Chambers.

I was only informed on September 24, 1956 that a messenger from Mr. Lipper's office had failed to file the amended complaint and to leave a copy at Hon. John M. Cashin's Chambers, when said messenger was advised by someone in Hon. John M. Cashin's Chambers that an Order had been filed in the case.

On September 25, 1956, a copy of the amended complaint was filed with the Clerk of the Court.

It is respectfully submitted that the recital in the Order of September 19, 1956 signed by Judge Cashin that "plaintiff, upon the argument of said motion having amended her complaint with the consent of defendant's counsel, and the court having considered such amendment as a part of

plaintiff's opposition to said motion thereon" does not entirely accord with the facts. No amendment is of record, and as Judge Cashin's Opinion notes, leave only was sought to amend. Judge Cashin's Opinion was based upon the *assumption* that the complaint was amended generally as stated and would appear to be a decision on the allegations of the complaint as amended as stated. (59) The order should probably be resettled to include the specific content of the amendment contemplated by plaintiff and assumed by Judge Cashin.

The amended complaint herein is in three counts. All of the counts include an allegation that the decedent died in the airspace above the ocean.

The first count invokes the jurisdiction of this Court upon the ground of diversity as in *Higa* v. *Transocean Airlines*, 124 F. Supp. 13, 14: "Plaintiff relies on the diversity clause as a procedural device for his action at law and bases his substantive rights upon the Death on the High Seas Act, citing among others *Sierra* v. *Pan American World Airways, Inc.*, B. C. Puerto Rico, 107 F. Supp. 519 and *Elliott* v. *Steinfeldt*, 254 App Div. 739, 4 N. Y. S. 2nd 9. ***" See the *Sierra* case, supra, holding that substantive rights and liabilities of the parties were governed by the Death on the High Seas Act, but not the remedial rights, and that the substantive rights and liabilities were not required to be enforced in admiralty.

The second count is based remedially and substantively upon the Death on the High Seas Act.

(60)

The third count is based upon the rights granted by the Convention.

/s/ Morris L. Weisberg
Morris L. Weisberg

(Sworn to and subscribed October 3, 1956.)

Reply Affidavit of William J. Junkerman

(41)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

RUTH NOEL,

Plaintiff,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

State of New York,
County of New York—ss.:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I make this affidavit in reply to the affidavit of Morris L. Weisberg sworn to the 3rd day of October, 1956, in opposition to defendant's motion to dismiss the amended complaint herein. Plaintiff's attorneys have blown hot

and cold with respect to their position before this Court ever since the oral argument on July 31, 1956. At the time of that oral argument plaintiff's attorneys acknowledged a defect in the complaint in that the suit was not brought by the personal representative of the decedent. However, they pointed out that executors had been appointed and deponent (42) thereupon consented that the complaint be deemed amended to show that fact. Plaintiff's counsel then argued that plaintiff's cause of action was not limited to admiralty jurisdiction because the Warsaw Convention created a cause of action at law in plaintiff's favor. He asked permission to amend the complaint to allege that it was based upon the Warsaw Convention as well as upon the Federal Death on the High Seas Act. Deponent argued that the flight as an international flight was governed by the Warsaw Convention but that changing the allegations of the complaint to specifically so allege would make absolutely no difference on the determination of the motion. The court thereupon directed that briefs be submitted on what effect, if any, the Warsaw Convention would have upon the question of dismissal of the complaint. Plaintiff's attorneys were given a week in which to submit a memorandum of law on the subject and defendant's attorneys were given three days in which to reply thereto. Plaintiff's attorneys served and filed their memorandum of law on or about August 7, 1956, and defendant's attorneys served and filed their reply memorandum on or about August 10, 1956. In these memoranda of law, both sides argued on the assumption that the complaint had, in fact, been amended to include the provisions of the Warsaw Convention and they argued the merits of the question. Thereafter, this Court handed down its decision on August 22, 1956.

At no time prior to the court's decision did plaintiff's attorneys actually serve or file any written amended

complaint. Apparently, on August 21, 1956, Harry Norman Ball, Esq., one of plaintiff's attorneys, in (43) Philadelphia, mailed a letter enclosing a copy of the amended complaint to defendant's attorneys. This was received in defendant's attorneys' office sometime on August 22, 1956. Plaintiff's attorneys apparently did not call said amended complaint to the attention of the court nor file it with the clerk of the court until September 25, 1956—almost a week after judgment was entered dismissing plaintiff's complaint.

It is respectfully submitted that the amended complaint to which this motion is directed is a nullity since the original complaint was amended once as a matter of course upon the oral argument of the motion on July 31, 1956, and no permission was thereafter given either by the court or by stipulation of the parties for the service of a second amended complaint. That this Court fully accepted plaintiff's oral amendment upon the oral argument of the motion on July 31, 1956, is evidenced by Judge Cashin's decision, which reads in part as follows:

> "Assuming the complaint to be amended as requested, the plaintiff argues that the cause of action under the Federal Death on the High Seas Act may be brought as a civil action and that the Warsaw Convention creates a separate cause of action which may be brought as a civil action.
>
> • • • •
>
> The question remains as to whether the Warsaw Convention creates a new cause of action and whether any such newly created cause of action may be brought as a civil action in the District Court. While there was at first some doubt as to whether the Convention was self-executing to any

extent (*Choy* v. *Pan American*, supra), there is no doubt at this time that, at least insofar as the Convention creates a rebuttal presumption of liability upon the happening of the accident (Article 17) and a limitation thereof except upon the showing of wilful misconduct (Article 25) that it is self-executing. * * *"

(44) The court thereafter thoroughly considered the recognized authorities on the subject and came to the conclusion that "Nowhere in the Convention is there any language which can be read to assure any of the advantages sought by the plaintiff." After the court's decision defendant prepared a proposed order and served it with notice of settlement on September 5, 1956. Plaintiff's attorneys thereupon served and filed a counter order with notice of settlement on the following day which was identical with the order submitted by defendant's attorneys except for the fact that plaintiff's proposed order omitted the words: "without prejudice to plaintiff's right to institute a suit in admiralty against defendant within the time limited by law." In the recital part of said order prepared and submitted by plaintiff's counsel, there is the following statement: "and plaintiff, upon the argument of said motion, having amended her complaint with the consent of defendant's counsel, and the court having consided such amendment as part of plaintiff's opposition to said motion, and due deliberation having been had thereon, and the court having made and filed its decision on August 22, 1956, * * *".

On September 7, 1956, Morris L. Weisberg, Esq., one of plaintiff's counsel, attended an official interview of Lt. Cmdr. Frederick J. Hancox at the United States Coast Guard offices at 80 Lafayette Street, New York City. At the conclusion of that hearing Mr. Weisberg

indicated to deponent that he would withdraw the amended complaint so served by mail. Subsequently, on September 11, 1956, deponent called Mr. Weisberg in Philadelphia and in the telephone conversation Mr. Weisberg advised deponent that he would sign a stipulation withdrawing the amended complaint. (45) Deponent thereupon prepared such a stipulation, signed five copies of the same and mailed them to Mr. Weisberg in a special delivery letter. A copy of said letter of transmittal is hereto annexed and marked Exhibit "A". The following day deponent received a telephone call from Mr. Weisberg in Philadelphia in which the latter was evasive about signing the stipulation. He indicated that he thought it better to wait until the court signed one of the orders submitted to it. Deponent then requested that Mr. Weisberg send him a stipulation not later than September 13th extending defendant's time to answer or move with respect to said amended complaint lest such a motion subsequently be deemed necessary to clarify the confused status presented by such service. This Mr. Weisberg declined to do. Accordingly, on September 13th defendant served the motion now before the court. On the following day deponent received a letter from Harry Norman Ball, Esq., advising that plaintiff's attorneys were withdrawing the proposed order which they had submitted on September 6th and enclosing another proposed order on Judge Cashin's decision.

WHEREFORE, deponent respectfully requests that defendant's motion for an order dismissing the amended complaint be granted.

WILLIAM J. JUNKERMAN

(Sworn to October 8, 1956.)

EXHIBIT "A", ANNEXED TO REPLY AFFIDAVIT OF WILLIAM J. JUNKERMAN

(46)

COPY

HAIGHT, GARDNER, POOR & HAVENS

80 Broad Street
New York 4, N. Y.

September 11, 1956

SPECIAL DELIVERY

Morris L. Weisberg, Esq.
Law Offices of Harry Norman Ball
1010 Packard Building
15th and Chestnut Streets
Philadelphia 2, Pa.

Noel & Frantz v. *L. A. V.*
Our file 2957-1C

Dear Mr. Weisberg:

Confirming our telephone conversation of this afternoon in which it was agreed that the formal written amended complaint which you served by mail from Philadelphia on August 21, 1956, is to be withdrawn, I am enclosing herewith five copies of stipulation withdrawing said amended complaint with the understanding that you will have it signed by Harry Norman Ball, Esq., and Joseph G. Feldman, Esq., and then mail it to the firm of Lipper, Shinn & Keeley, in New York City, so that they may also sign the stipulation. When it has been signed by all parties will you kindly see than an original and one copy is returned to me. I will then have the original filed in court and retain one copy for our records.

Very truly yours,

WILLIAM J. JUNKERMAN

WJJ:MD
Enc.